

STATE OF SOUTH CAROLINA,)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)
)
CARL ROBERT COLE,)
 Plaintiff,)
)
vs.)
)
RICHARD SIMPSON,)
 Defendant.)

TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Greenville, South Carolina

s/ Candy M. Kern- Fuller

Plaintiff/Attorney for Plaintiff

Dated: January 31, 2017

Address: **UPSTATE LAW GROUP, LLC**
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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS FOR
COUNTY OF GREENVILLE) THE THIRTEENTH JUDICIAL CIRCUIT
CARL ROBERT COLE,)
Plaintiff,)
v.)
RICHARD SIMPSON,)
Defendant.)

)

**COMPLAINT
(JURY TRIAL DEMANDED)**

C.A. No. 2017-CP-23-_____

The Plaintiff, complaining of the Defendant herein, would show unto this Honorable Court as follows:

PARTIES AND JURISDICTION

1. Plaintiff is an individual located in Seguin, Texas;
2. Upon information and belief, Defendant is an individual last known to be located in Cape Coral, Florida;
3. All acts complained of occurred in whole or in part in the State of South Carolina;
4. Furthermore, this State has personal jurisdiction over Defendant by virtue of Defendant transacting business in this State, contracting to supply services or things in the State, committing a tortious act in whole or in part in this State, and entering into a contract to be performed in whole or in part in this State;
5. Additionally, Defendant has consented to the jurisdiction of this State and the venue of this proceeding in this Circuit Court in Greenville, South Carolina as well as the application of a choice of law for South Carolina in the Contract for Sale of Payments which is the subject of this action (attached hereto and incorporated herein as **Exhibit A**);

BACKGROUND/FACTS

6. On or about September 17, 2013, Defendant executed a “Contract for Sale of Payments” (hereinafter referred to as the “Contract”), whereby Defendant agreed to sell a series of future payments derived from a guaranteed, life contingent income stream received by Defendant. (See “**Exhibit A**”);

7. Specifically, Defendant’s sold the rights to a portion of his total future payment stream totaling One Hundred and Twenty (120) monthly payments of Five Hundred and Eighty-Seven (\$587.11) Dollars and Eleven Cents, for an aggregate total of Seventy Thousand Four Hundred and Fifty Three (\$70,453.20) Dollars and Twenty Cents, beginning with a payment on October 15, 2013 and running through the contract completion date of September 15, 2023. This sale transaction was entered into and completed with the assistance of one or more brokers and/or other intermediaries who received compensation for their services to Defendant. The gross total of the lump sum payment made for Defendant’s benefit was Fifty Thousand (\$50,000.00) Dollars.

8. Under the terms of the Contract, Defendant sold One Hundred and Twenty (120), Five Hundred and Eighty-Seven Dollars and Eleven Cents (\$587.11) payments of the future payment stream described in the Contract, while retaining actual and legal ownership of each payment made to him by the underlying asset, until disbursed to him. The contract contemplates that Defendant receive each payment and then forward each payment an escrow agent established under the terms of the Contract.

9. In conjunction with the Contract, Defendant also executed a Security Agreement granting a “security interest in any and all banking or financial accounts of which [Defendant is an] account holder or beneficiary.” (See Security Agreement, attached hereto as **Exhibit B** and incorporated herein by reference).

10. Under the terms of the Security Agreement, Defendant represented and covenanted:

- (c) the Seller/Debtor will not assign, sell, lease, transfer, or otherwise dispose of or abandon, nor will Seller/Debtor suffer or permit any of the same to occur with respect to, the Collateral, and the inclusion of "proceeds" of the Collateral under the security interest granted herein shall not be deemed a consent by Secured Party to any sale or other disposition of any Collateral;

Exhibit B, ¶ 3(c).

11. Following Defendant's execution of the Contract and Security Agreement, Defendant forwarded only Twenty-Seven (27) payments totaling to the amount of Fifteen Thousand Eight Hundred Fifty-One Dollars and Ninety-Seven Cents (\$15,851.97) in payments from the payment stream securing the obligations under the Contract and Security Agreement. Thereafter, Defendant failed and refused to send the payments or return the benefits he received under the Contract.

12. Defendant has converted all the payments since January 15, 2016, solely to his own use and benefit to the derogation of the Contract. No further payments have been received by the escrow agent, resulting in no further payments being made to Plaintiff.

13. Furthermore, Defendant has not refunded Thirty-Four Thousand One Hundred Forty-Eight Dollars and Three Cents (\$34,148.03) of the Fifty Thousand Dollars (\$50,000.00) lump sum paid by Plaintiff.

14. Defendant's actions are intentional acts undertaken by him.

15. Defendant's actions constitute a violation of both the Contract (**Exhibit A.**) and the Security Agreement (**Exhibit B.**).

16. As a result, Plaintiff's rights to the property, i.e., the payments contracted in the Contract and Security Agreement, have been violated and harmed, without prior notice to it, in violation of his rights to continue to receive his portion of the payment stream, as part of a bargained-for exchange.

17. Furthermore, Defendant has tortiously and wrongfully diverted payments and failed and refused to abide by the provisions of the Contract, or make any efforts to comply with the Contract, despite demands for compliance therewith;

FOR A FIRST CLAIM
(BREACH OF CONTRACT)

18. Plaintiff realleges all previous paragraphs as if fully restated herein;

19. On or about September 17, 2013, Mr.Cole and Defendant entered into a private contract which was reduced to writing and which is attached hereto as **Exhibit A**. In exchange for the mutual promises contained within the contract, on or about October 17, 2013, Defendant, by and through his agents, and to entities on his behalf, was paid a gross lump sum payment of the Fifty Thousand (\$50,000.00) Dollars;

20. Thereafter, Defendant only complied with the contract for Twenty-Seven (27) months (November, 2013 to January, 2016) before intentionally breaching the contract in or about February, 2016;

21. As a direct and proximate result of Defendant's unlawful actions, Defendant thereafter immediately converted to his own use, the payments due pursuant to the contracts from the months of February, 2016, through present;

22. Accordingly, Plaintiff is entitled to actual, consequential, and other damages as permitted by law and as determined by the triers of fact;

FOR A SECOND CLAIM
(SPECIFIC PERFORMANCE)

23. Plaintiff realleges all previous paragraphs as if fully restated herein;

24. There exists valid and enforceable contracts (**Exhibits A. and B.**);

25. The Contracts are fair, just, and equitable;

26. Defendant received payment in accordance with the Contract and with the Defendant's approval;
27. The escrow agent designated in the Contract remains available to receive said payments and to fully perform the contract;
28. Accordingly, Plaintiff is entitled to a decree of this Court requiring Defendant to specifically perform under the terms of the Contracts;

FOR A THIRD CLAIM
(CONSTRUCTIVE TRUST)

29. Plaintiff realleges all previous paragraphs as if fully restated herein;
30. Defendant and parties on Defendant's behalf received Fifty Thousand (\$50,000.00) Dollars in conjunction with the Contract and Security Agreement, including, but not limited to, Defendant's brokers and intermediaries;
31. In exchange for those payments, pursuant to the Contract, Defendant was to pay a total of Seventy Thousand Four Hundred Fifty-Three Dollars and Twenty Cents (\$70,453.20) in One Hundred Twenty (120) payments of Five Hundred Eighty-Seven Dollars and Eleven Cents (\$587.11) over a period of Ten (10) years;
32. However, Defendant has made no further payments pursuant to the contract and, instead, Defendant improperly converted all the payments since the date of breach solely to his own benefit.
33. Pursuant to the Security Agreement entered into by Defendant:

(f) after the occurrence and during the continuation of a Default, any proceeds of the Collateral received by the Seller/Debtor shall not be commingled with other property of the Seller/Debtor, but shall be segregated, held by the Seller/Debtor in trust for Secured Party, and immediately delivered to Secured Party in the form received, duly endorsed in blank where appropriate to effectuate the provisions hereof, the same to be held by Secured Party as additional Collateral hereunder or, at Secured Party's option, to be applied to payment of the obligations, whether or not due and in any order.

34. At a minimum, and without waiving any other claims current or to be asserted, Plaintiff is entitled to imposition of a constructive trust of no less than Fifty-Four Thousand Six Hundred One

Dollars and Twenty-Three Cents (\$54,601.23) and continuing, based on the funds actually converted by the Defendant, which is subject to the Contract and Security Agreement and which constitutes constructive trust assets;

35. In addition, the constructive trust *res* should be defined to include the amounts paid in commissions and fees associated with this transaction in an amount to be proven at trial, plus attorneys' fees and costs;

FOR A FOURTH CLAIM
(CONVERSION)

36. Plaintiff realleges all previous paragraphs as if fully restated herein;

37. As stated above, under the terms of the Contract, Defendant sold and transferred his right, title and interest to a payment in the amount of Five Hundred and Eighty-Seven (\$587.11) Dollars and Eleven Cents per month of the future payment stream described in the Contract, while retaining actual legal ownership and actual control of each payment made to him by the underlying asset, until received by him;

38. Such actual legal ownership and control over the underlying asset is no more evident than the fact that Defendant tortiously and wrongfully diverted the payments to another account and thereafter failed and refused to abide by the provisions of the Contract, or make any efforts to comply with the Contract, despite demands for compliance therewith;

39. By wrongfully directing the payments to an account solely for his own benefit, in derogation of the contract, Defendant converted the payments under the Contract to his own exclusive use and benefit to the exclusion of the Plaintiff's rights to the property;

40. The Plaintiff has a right to ownership of his portion of the income stream payment via the Contract and Security Agreement;

41. The Defendant took sole control and possession of the Plaintiff's portion of the payment and prevented the Plaintiff from using the property;

42. Though Defendant at all times retained absolute control and a legal right to the underlying asset (i.e. the income stream), he converted Plaintiff's portion of the income stream to his own use and thereafter improperly disposed of it for his own benefit;

43. Plaintiff, by and through his attorneys, demanded Defendant return said property and to conform his actions to the contract, but Defendant failed and refused to respond and retained said property after the Plaintiff asked the Defendant to return it;

44. Accordingly, Plaintiff is entitled to actual damages in an amount to be determined by a jury of his peers. Furthermore, Defendant's actions were willful, reckless, and/or committed with conscious indifference to the rights of Plaintiff, therefore Plaintiff is further entitled to punitive damages in an amount to deter such future acts;

FOR A FIFTH CLAIM
(UNJUST ENRICHMENT)

45. Plaintiff realleges all previous paragraphs as if fully restated herein;

46. Defendant has been enriched by the payment to him;

47. Defendant would be unjustly enriched were he permitted to retain the benefit of the significant lump sum payment made to him as well as the monthly payments from the underlying asset that were contracted in exchange for said lump sum;

48. Accordingly, this Court, sitting in equity, should exercise its equitable powers to prevent the unjust enrichment of Defendant and disgorge any improper enrichment of Defendant.

WHEREFORE, having fully set forth his claims, Plaintiff requests as follows:

- a) A trial by a jury of his peers on all matters at law;
- b) Actual, compensatory, consequential, liquidated and punitive damages (where appropriate);
- c) The exercise of this Court's equitable powers; and
- d) Such other and further relief as this Court deems just and proper.

s/ Candy M. Kern-Fuller
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January 31, 2017

ATTORNEY FOR PLAINTIFF